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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 888

PACIFIC FAR EAST LINE, INC., ET AL., *Petitioners*,

v.

PACIFIC SEAFARERS, INC., ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Constitutional Provision, Statutes, and Regulations Involved	2
Question Presented	2
Statement of the Case	3
Argument	10
Conclusion	22
Appendix	23

CITATIONS

CASES:

American Construction Co. v. Jacksonville Railway, 148 U.S. 372	12
Atlantic Cleaners & Dyers v. United States, 286 U.S. 427	16
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213	10, 19, 20
Chicago v. Atchison, Topeka & Santa F. R. Co., 357 U.S. 77	11
Collins v. Miller, 252 U.S. 364	11
Ercona Camera Corporation v. Brownell, 246 F. 2d 675 (C.A.D.C.)	10
Federal Trade Com. v. Cement Institute, 333 U.S. 683	22
Georgia v. Pennsylvania R. Co., 324 U.S. 439	20
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1	15, 16
In re Grand Jury Investigation of the Shipping Industry, 186 F. Supp. 298 (D.D.C.)	17
Irving Nat. Bank v. Law, 10 F. 2d 721 (C.A. 2)	21
John Hancock Mut. Life Ins. Co. v. Kraft, 200 F. 2d 952 (C.A. 2)	10
Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207	17
Moore v. Mead's Fine Bread Co., 348 U.S. 115	17
Pevely Dairy Co. v. United States, 178 F. 2d 363 (C.A. 8)	16

Page

Poller v. Columbia Broadcasting System, 368 U.S. 464 ..... 13, 14, 15
Pope v. Atlantic Coast Line R. Co., 345 U.S. 379 12
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 ..... 11, 12
Simpson v. Union Oil Co., 377 U.S. 13 17
United Shoe Machinery Corp. v. United States, 258 U.S. 451 22
United States v. Anchor Line, Ltd., 232 F. Supp. 379 (S.D.N.Y.) 21
United States v. Chrysler Corp., 180 F. 2d 557 (C.A. 9) 16
United States v. Concentrated Phosphate Export Ass'n., 273 F. Supp. 263 (S.D.N.Y.) 13, 14
United States v. Continental Oil Co., 377 U.S. 161 13
United States v. Florian, 312 U.S. 656 10
United States v. Frankfort Distilleries, 324 U.S. 293 ..... 16, 17
United States v. General Motors Corp., 323 U.S. 373 12
United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass.) 18
United States v. Phosphate Export Assn., — U.S. —, 21 L. ed. 2d 344 ..... 13, 14, 15, 18
United States v. South-Eastern Underwriters Assn., 322 U.S. 533 16
Utah Gas Pipelines Corp. v. El Paso Natural Gas Co., 233 F. Supp. 955 (D. Utah) 16
Vermilya-Brown Co. v. Connell, 335 U.S. 377 12
White Motor Company v. United States, 372 U.S. 253 ..... 13, 14, 15
Yates v. United States, 354 U.S. 298 21

CONSTITUTION AND STATUTES:

Constitution, Article I, Section 8, Clause 3 ..... 2, 23

Act of July 2, 1890, c. 647,

§ 1, 26 Stat. 209, 15 U.S.C. 1 ..... 2, 5, 23

§ 2, 26 Stat. 209, 15 U.S.C. 2 ..... 2, 5, 23

§ 3, 26 Stat. 209, 15 U.S.C. 3 ..... 2, 5, 23

Act of October 15, 1914, c. 323,

§ 4, 38 Stat. 731, 15 U.S.C. 15 ..... 2, 24

Page

Act of Aug. 26, 1954, c. 936, 68 Stat. 832, as amended, 46 U.S.C. 1241(b) 2, 4, 24

P.L. 87-195, Pt. 1, § 102, Sept. 4, 1961, 75 Stat. 424, 22 U.S.C. 2151 ..... 2, 26

Shipping Act of 1916, 39 Stat. 728, 46 U.S.C. 801 7

28 U.S.C. 1292(b) 10

Webb-Pomerene Act, 40 Stat. 517, 15 U.S.C. 62 13

MISCELLANEOUS:

AID Regulation 1, Section 201.6(N), 22 C.F.R. 201.6(N) 2, 4, 14, 15, 25

Report of the Attorney General's Committee to Study the Antitrust Laws 17

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, printed in Appendix A to the petition, pp. 1a-24a, is not yet officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The pertinent parts of the Constitution, statutes, and regulations involved, set forth in the Appendix hereto, are:

Constitution, Article I, Section 8, Clause 3

Act of July 2, 1890, c. 647,

§ 1, 26 Stat. 209, 15 U.S.C. 1
§ 2, 26 Stat. 209, 15 U.S.C. 2
§ 3, 26 Stat. 209, 15 U.S.C. 3

Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U.S.C. 15

Act of Aug. 26, 1954, c. 936, 68 Stat. 832, as amended, 46 U.S.C. 1241(b)

P.L. 87-195, Pt. I, § 102, Sept. 4, 1961, 75 Stat. 424, 22 U.S.C. 2151

AID Regulation 1, Section 201.6(N), 22 C.F.R. 201.6(N)

QUESTION PRESENTED

Petitioners are United States-flag shipping lines engaged, as part of their commerce to and from the United States, in carrying foreign assistance cargoes between Taiwan, Thailand, and South Vietnam, the cost of which cargoes and the freight charges for which are paid for with Agency for International Development (AID) funds provided by the United States Government. Respondents are also United States-flag shipping lines which competed with petitioners in the carriage of such cargoes. By reason of the Cargo Preference Law, as implemented by AID policy, the

carriage of such cargoes was effectively reserved for, and limited to, American-flag shipping.

The question presented is whether, under those facts, the Sherman Act is applicable to a conspiracy among petitioners to drive respondents out of business.

STATEMENT OF THE CASE

The following are the pertinent facts, set forth in the complaint filed by respondents herein, which, as the court below held, "must be accepted as true for purposes of a motion to dismiss" (App. 3a).[1]

Respondents are American corporations which, at the times material to this case, were engaged in the ocean shipping business.[2] JA 6-7.[3] They operated United States-flag vessels manned by American crews. JA 12. Respondents' business operations were centered in New York, and their ships started from, and intermittently returned to, the United States for personnel and maintenance requirements. JA 12. In 1962 respondents entered into competition with petitioners for the carriage of AID cargo in the Far East, as more particularly hereinafter described. JA 12.

The corporate petitioners are common carriers by water engaged in the transportation of property to and from various ports in the United States and ports in other countries and between ports in other countries.

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[1] "App." references are to the Appendix to the Petition.

[2] With the exception of one of respondents which served as managing agency for the others. JA 7.

[3] References herein to JA are to the joint appendix as printed for the use of the court below.

JA 11. Ten of such petitioners[4] are engaged in the transportation of property to and from various ports in the United States and the Far East. JA 11. As part of their service between the United States and the Far East said petitioners pick up cargo at Far East ports and unload it at other Far East ports. JA 11. This traffic, sometimes referred to as the Far East interport trade, is an integral part of petitioners' service to and from the United States. JA 11. The rates for this Far East interport service were set by agreement of petitioners, issued and published under the name of AFBO,[5] an organization of which all such petitioners were members. JA 12. The rates established by this agreement were adhered to by petitioners in the carrying of Far East interport cargoes. JA 12. The AFBO rate agreement was neither submitted to nor approved by the Federal Maritime Commission. JA 12.

The Cargo Preference Law, Appendix, *infra,* p. 24, which has been made applicable to AID cargoes by that agency's Regulation 1, Appendix, *infra,* p. 25, requires that at least 50 per cent of such cargoes be transported in privately-owned United States-flag commercial vessels. App. 3a-4a. AID provides the funds for the transportation of the cargoes, as well as for the cargoes themselves. JA 12. As a matter of policy, AID pays the entire cost of transportation (instead of just the 50 per cent) where the cargo is transported on

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[4] Pacific Far East Line, Inc., States Marine Lines, Inc., American President Lines, Ltd., Waterman Steamship Corporation, American Export Isbrandtsen Lines, Inc., American Mail Line, Ltd., States Steamship Company, United States Lines Company, and Lykes Bros. Steamship Co., Inc.

[5] American-Flag Berth Operators.

United States-flag commercial vessels. JA 147. The practical effect of this policy has been to reserve the carriage of AID cargoes for American shipping and to eliminate foreign competition therefrom. JA 11-12.

From the time that respondents entered into competition with petitioners in the Far East interport trade petitioners, for the purpose of eliminating respondents from such trade, engaged in a combination and conspiracy in restraint of trade and commerce and to monopolize trade and commerce in violation of sections 1, 2, and 3 of the Sherman Act, 15 U.S.C. 1, 2, and 3. JA 13. Petitioners sought to monopolize the Far East interport portion of their trade for the benefit of those petitioners who engaged in such trade (JA 13), to eliminate from such trade all competition from others, particularly the respondents (JA 13), and to obtain for such petitioners the highest possible amount of AID funds through the perpetuation and maintenance of the AFBO rate-fixing agreement. JA 13.

Petitioners' first effort to eliminate respondents' competition was to seek issuance of a directive from AID limiting AID shipping in the area to "conference liners." That would have eliminated respondents' vessels, but this effort of petitioners was not successful. JA 13-14.

Petitioners then successfully urged the Director General of Commerce of South Vietnam to issue a ruling to South Vietnamese importers requiring that all future AID shipments of cement be shipped on liners operated by AFBO members. Respondents were not then members of AFBO, but AID effectively countermanded that directive. JA 14.

Next, respondent Pacific Seafarers, Inc. (PSI) was told by the Director General that it would have to become a member of petitioner WCAFBO [6] if it wished to continue in the South Vietnam cement business. JA 14-15. When respondent PSI tried to comply, its application for membership was blocked because it had no Military Sea Transportation Service (MSTS) contract with the Defense Department, as did other WCAFBO members. When respondent sought such an eligibility contract, seven of petitioners tried to block it by protesting to the Defense Department. That too was unsuccessful. JA 15.

Finally, for the purpose of driving respondents out of business, the petitioners who were AFBO members agreed to "open" the rates on cement and fertilizer, the two commodities essential to the continuance of respondents' service, while maintaining petitioners' agreed upon rates on other products and commodities. JA 15. This rate "opening" was followed by reductions in the rate on cement from Taiwan to South Vietnam from $8.95 to $4.96 per long ton. The reduced rates were so unreasonably low as to insure that respondents could not continue to carry cement and fertilizer without incurring substantial losses. JA 16.

The "opening" of rates had its intended effect. Respondents were shortly driven out of business. JA 16. Thereafter, petitioners raised the rates, and indeed raised them to substantially higher levels than those prevailing prior to the "opening". JA 16.

In April 1963 respondent PSI filed a complaint with the Federal Maritime Commission charging that cer-

[6] West Coast American-Flag Berth Operators.

tain of petitioners' acts complained of in this action violated section 15 of the Shipping Act of 1916, 39 Stat. 733, 46 U.S.C. 814, App. 3d. JA 38. Following hearings, a hearing examiner's initial decision, and exceptions thereto, the Commission issued its decision (JA 111-120). The Commission found that the Far East interport trade "does not involve as one terminus any port in a State, District, Territory or possession of the United States" (JA 117); that therefore "the carriers, within the AFBO context cannot be deemed to be engaged in the foreign commerce of the United States" (JA 117) for the reason that the Shipping Act defines "a common carrier in foreign commerce" as one which is "engaged in the transportation by water of passengers or property between the United States * * * and a foreign country" (§ 1, 39 Stat. 728, 46 U.S.C. 801, App. 1d; JA 115-116); and that therefore "the reach of the [Shipping] Act and, consequently [the Commission's] jurisdiction, does not extend to the matters complained of." JA 115. The Commission accordingly dismissed the PSI complaint for want of jurisdiction. JA 120.

On November 18, 1966, respondents filed their complaint in this action in the United States District Court for the District of Columbia charging petitioners with violations of the Sherman Act as set forth above. JA 4-18. The complaint alleges, in addition to the allegations detailed above, that the services, organization, and personnel of petitioners AGAFBO[7] and WCAFBO were used to effectuate the combination and conspiracy described, that all the corporate petitioners are members of either AGAFBO or WCAFBO or both, and

[7] Atlantic and Gulf American-Flag Berth Operators.

that all the corporate petitioners consented to and acquiesced in the use of the services, organization, and personnel of AGAFBO and WCAFBO for such purposes and thereby participated in and contributed to the effectuation of the conspiracy. JA 16.

Three petitioners answered the complaint. JA 19-25, 29-33, 120-27. Others filed various motions. There were motions to dismiss on the ground that the district court was without jurisdiction over the subject matter (JA 33-34, 36-37), and motions for summary judgment on the same ground, which were treated by the parties, as well as by the district court, as the equivalent of motions to dismiss.

Following oral argument, the district court ruled from the bench

> "that the complaint does not state facts constituting a cause of action under the Sherman Antitrust Act and, therefore, the Court is without jurisdiction and the motions to dismiss will be granted." JA 167.

On June 9, 1967, the court dismissed the complaint in its entirety on the ground that the court was "without jurisdiction over the subject matter." JA 168.

On appeal, the court below (McGowan, Tamm, and Leventhal, Circuit Judges) reversed the judgment of the district court and remanded the case.

The court below, in an opinion by Judge Leventhal speaking for a unanimous court, was clear that respondents were engaged in the foreign commerce of the United States not only in the constitutional sense, but also "for purposes * * * of determining the applicability of the Sherman Act, which prohibits conspiracies

'in restraint of trade or commerce among the several States or with foreign nations.'" (App. 14a) "We have no doubt", Judge Leventhal wrote, "that the Sherman Act applies to the restraint alleged here, an attempt by American firms to deny another American firm access to a line of international shipping trade created by Congress for the general benefit of American shipping." App. 9a. The court held that

> "since there is an identifiable, distinctive market for American-flag shipping service where the American characteristic is dominant—a market defined as involving the transportation of AID-financed cargoes, which has a definite nexus with significant interests of the United States—the Sherman Act is applicable to a conspiracy to exclude newcomers from the trade." App. 19a.

The court found that

> "Since the United States has established and promoted, in carriage of AID-financed movements, this trade of providing American-flag shipping service, it is only reasonable to expect the 'fundamental national economic policy' of the antitrust laws to be applicable" (App. 20a)

and that

> "It is also significant, for the purpose of determining whether what is involved constitutes activities affecting American foreign commerce within the scope of the antitrust laws that the trade not only has significant contacts and nexus with the United States but also is the province of American concerns." App. 21a.

The court below rejected petitioners' contention that the Sherman Act was to be read as limited by the

Shipping Act (App. 21a-24a), pointing out that this Court, in *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 217, had "declined to countenance any '*unstated* legislative purpose to free the shipping industry from the antitrust laws.'" App. 22a. The court also rejected the argument of petitioners that collateral estoppel precluded "relitigation" by respondents of the Maritime Commission's determination that the Far East interport trade was not part of the foreign commerce of the United States, as that determination rested not on Sherman Act standards, but solely on the standards and definitions of the Shipping Act. App. 6a-7a.

ARGUMENT

The case does not warrant review. The decision of the court below is correct. There is no conflict of decisions. Moreover, since the effect of the decision below was to deny petitioners' motions to dismiss and remand the case to the district court for trial, for this Court to exercise its certiorari jurisdiction to review the case at this time would be premature. We shall treat of this first.

1. In its present posture this case is not ripe for review by this Court on certiorari. The effect of the judgment below, which reversed the district court's dismissal of the action on petitioners' motions to dismiss, is to return the case to the district court in the same posture it would have had if the district court had denied petitioners' motions to dismiss. Such a denial, without more (cf. 28 U.S.C. 1292(b)), would not have been appealable. *United States* v. *Florian,* 312 U.S. 656; *Ercona Camera Corporation* v. *Brownell,* 246 F. 2d 675 (C.A.D.C.); *John Hancock Mut. Life Ins.*

Co. v. *Kraft*, 200 F. 2d 952 (C.A. 2). On remand to the district court, the case will proceed through usual pretrial discovery and on to trial. Whether all or some of the petitioners will emerge victorious, whether all or some of the respondents will be awarded damages and, if so, how much—these are questions that must await the outcome of the trial. Some or all of the numerous parties may prosecute further appeals to the court of appeals, and there may even be a further petition for certiorari filed.

As stated in *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 123-24:

> "Since its establishment, it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance. [Citing cases] This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. *Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for Federal appellate jurisdiction.*" (Emphasis supplied)

"Good judicial administration" requires that a judgment of which review is sought "should be final not only as to all the parties, but as to the whole subject-matter" (see *Collins* v. *Miller*, 252 U.S. 364, 370) rather than as to merely a liminal matter as here.

This case is unlike *Chicago* v. *Atchison, Topeka & Santa F. R. Co.*, 357 U.S. 77, cited by petitioners, where "By its decision the Court of Appeals resolved all disputed questions between the parties * * * all that remained for the District Court on remand was to for-

mally enter judgment for the plaintiff" (357 U.S. at 83), and where, indeed, the Court implied that if all disputed questions had not been resolved and if more had "remain[ed] to be done but the mechanical entry of judgment by the trial court" (see *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 382), review by this Court would have been regarded as premature.

No extraordinary inconvenience or embarrassment in the further conduct of this cause (see *American Construction Co.* v. *Jacksonville Railway*, 148 U.S. 372, 384) has been shown, nor can it be, by petitioners. Nor does the ruling below carry the "serious public consequences" warranting a departure from this Court's usual requirement of finality before it exercises its jurisdiction. See the *WOW* case, *supra*.[8] Nor are there here present other factors impelling this Court's review of an interlocutory order, such as a conflict among the Federal courts as to the meaning of a constitutional provision,[9] the resolution of which "is fundamental to the further conduct of the case." See *United States* v. *General Motors Corp.*, 323 U.S. 373, 377. In these circumstances, even were there any factors in this case indicating review on certiorari, the Court should exercise its discretion so as to avoid fragmented, piecemeal review of this litigation.

2. Petitioners, by seeking review on certiorari at this stage of the litigation, are in effect seeking to reinstate

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[8] Cf. *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, involving the applicability of the Fair Labor Standards Act to employees on naval and air bases leased to the United States under executive agreements with foreign governments.

[9] The only conflict asserted by petitioners, discussed *infra*, p. 14, is of a much lower order and, indeed, resolves itself to being one of fact.

the dismissal of the complaint by the district court on motion. This runs counter to the principle enunciated in *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 473:

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."

See also *United States* v. *Continental Oil Co.,* 377 U.S. 161; *The White Motor Company* v. *United States,* 372 U.S. 253, 264. If summary procedures are inappropriate in cases like *Poller* and *White Motor,* they are even less appropriate to the disposition of basic jurisdictional questions under the Commerce Clause and the Sherman Act. The relationship of the Far East interport trade to the overall activities of the parties, the impact of petitioners' activities on the United States and its foreign commerce, the extent of AID involvement and control—all bear on the question of Sherman Act jurisdiction, and call for trial rather than summary disposition.

The question of AID involvement and control furnishes a good example. In *United States* v. *Phosphate Export Assn.,* — U.S. —, 21 L. ed. 2d 344, the question was whether certain AID-financed transactions with the Republic of Korea were exports within the meaning of the Webb-Pomerene Act, 40 Stat. 517, 15 U.S.C. 62. In that case too, as here, the defendants argued "that AID was but an incidental party to the transaction—no more than the usual financing institution" (see *United States* v. *Concentrated Phosphate Export Ass'n,* 273 F. Supp. 263, 270 (S.D.N.Y.)), an

argument accepted by neither the district court nor this Court. After examining the nature of the transactions and the AID relationship thereto, as elucidated in "a more complete record" (App. 19a) and detailed findings by the district court, this Court held:

> "We must look at the economic reality of the relevant transactions. Here, although the fertilizer shipments were consigned to Korea and although in most cases Korea formally let the contracts, American participation was the overwhelmingly dominant feature. The burden of noncompetitive pricing fell not on any foreign purchaser, but on the American taxpayer. The United States was, in essence, furnishing fertilizer to Korea. AID selected the commodity, determined the amount to be purchased, controlled the contracting process, and paid the bill. The foreign elements in the transaction were, by comparison, insignificant. It stretches neither the language nor the purpose of the Act to determine that such a sale is not an 'export'." 21 L. ed. 2d at 351-52.

Now petitioners would have this Court believe that there is a conflict between the decision below and this Court's decision in *Phosphate*. But the "conflicts" petitioners point to (Pet. 15) are purely factual. They assert that there are factual differences between the AID relationship to the fertilizer shipments to Korea in *Phosphate* and the AID relationship to the cement and fertilizer shipments to Vietnam in the instant case. But it was for the resolution of such matters as these asserted differences that this Court called for trials, as distinguished from summary disposition, in *Poller* and *White Motor*. Just as the AID Regulation 1 involved in the *Phosphate* case (see *United States* v. *Concentrated Phosphate Export Ass'n*, 273 F. Supp.

263, 269-70 (S.D.N.Y.)) is the same as the AID Regulation 1 in the instant case (see JA 146), development herein of a full record would show that in terms of "the economic reality of the relevant transactions" (21 L. ed. 2d at 351) there are no differences of substance between this case and the *Phosphate* case. See JA 13-14. Thus, under *Poller* and *White Motor,* the "factual polarization" asserted by petitioners (Pet. 16) between this case and *Phosphate* militates not for granting the petition, but for denying it so that the trial that those cases call for can be had.

3. The court below was clearly correct in its holding (App. 9a) that

> "plaintiffs, in participating in the market of supplying the service of transportation in United States-flag vessels, were engaged in foreign commerce of the United States. We have no doubt that the Sherman Act applies to the restraint alleged here, an attempt by American firms to deny another American firm access to a line of international shipping trade created by Congress for the general benefit of American shipping."

The broad constitutional concept of "commerce", which includes navigation, was expounded in *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1. There the Court held that the commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." 22 U.S. (9 Wheat.) at 196. As stated by the court below (App. 12a):

> "*Gibbons* v. *Ogden* unequivocally states that the constitutional language granting Congress power to regulate 'commerce with foreign nations' authorizes Congressional enactment of laws regulat-

ing 'every species of commercial intercourse between the United States and foreign nations'." [10]

The Sherman Act is a law regulating "commercial intercourse"; and its reach is as extensive as that of the Congress under the Commerce Clause. In enacting the Sherman Act, Congress went "to the utmost extent of its constitutional power"; it "left no area of its constitutional power unoccupied." *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, 558; *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 298; *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 435; *United States* v. *Chrysler Corp.*, 180 F. 2d 557, 559 (C.A. 9); *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363, 366 (C.A. 8); *Utah Gas Pipelines Corp.* v. *El Paso Natural Gas Co.*, 233 F. Supp. 955, 961 (D. Utah).

Petitioners' argument (Pet. 9) that there is no Sherman Act jurisdiction "where there is no substantial effect on United States imports and exports or transportation between the United States and foreign ports", is without merit. Even were there merit to the proposition thus stated, the petitioners' factual predicate has no foundation. At a trial the respondents could show the substantial effect of their interport trade on United States imports and exports carried by others, and the similar effect on transportation between the United States and foreign ports. Respondents also could show the effect that driving them out of business has had on the import-export trade and on transportation between the United States and foreign ports. More importantly, however, as the Court below held, "The Sherman Act is not limited, in effect, to restraints on sales of goods. * * * In the domestic set-

[10] 22 U.S. (9 Wheat.) at 193.

ting * * * it is settled that the Sherman Act's bar on unreasonable restraints on trade or commerce extends to service industries—and transportation is clearly a service industry—as part of commerce. There is no basis in the statute or in reason to argue that conspiracies in service industries are proscribed only if the services are in interstate commerce, and not if they are in foreign commerce." (App. 17a)[11]

The court below, while terming *"res nova"* the question whether foreign commerce applications of the Sherman Act must always involve either exports or imports of goods or transportation to or from United States ports (App. 18a), recognized that there is nothing novel in the principles which govern. The opinion below points out that (App. 18a-19a):

> "It may be noted that in related contexts contentions close to those urged by [petitioners] have not been accepted. A mechanical commodity export-import limitation was rejected by the District Court in *In re Grand Jury Investigation of the Shipping Industry,* 186 F. Supp. 298, 313 (D.D.C. 1960). Prior to that it had been rejected as unsound by the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws (pp. 77-80). We reject it also.

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[11] The Court below rested its decision on its determination that respondents' activities as alleged in the complaint (JA 6-7, 12-17) were such that respondents themselves were engaged in United States foreign commerce. But even were this not so, Sherman Act jurisdiction is present here. Petitioners are admittedly engaged in foreign commerce, of which the Far East interport trade is an integral part (JA 11). A combination and conspiracy among those engaged in interstate or foreign commerce, such as petitioners, to injure competitors, such as respondents, violates the Sherman Act whether or not the victims of the conspiracy are engaged in interstate or foreign commerce. *United States* v. *Frankfort Distilleries,* 324 U.S. 293, 298; *Moore* v. *Mead's Fine Bread Co.,* 348 U.S. 115, 119; *Klor's, Inc.* v. *Broadway-Hale Stores,* 359 U.S. 207, 213; *Simpson* v. *Union Oil Co.,* 377 U.S. 13, 16.

> "It may be assumed that, as a matter of construing Congressional intent, the Sherman Act has no application where the market involved consists of shipping services between two foreign ports, without any American characteristic, and the only American aspect is that one or some of the persons competing in the transportation market is offering American flag ships. *In the case before us, however,* we hold that, *since there is an identifiable, distinctive market for American-flag shipping service where the American characteristic is dominant—a market defined as involving the transportation of AID-financed cargoes, which has a definite nexus with significant interests of the United States—the Sherman Act is applicable to a conspiracy to exclude newcomers from the trade.*" (Emphasis supplied)

This holding is buttressed by the fact that the interport "trade is entirely a product of the United States policy of subsidizing its merchant marine" (App. 19a) and by the impact of AID direction, control, and financing of the interport shipments, and the court below so held. Since then, this Court, in *United States* v. *Phosphate Export Assn., supra,* has held that Congress did not mean "to insulate transactions initiated, controlled, and financed by the American Government, just because a foreign government is the nominal 'purchaser'." 21 L. ed. 2d at 351. Nor are such transactions insulated just because actual shipments take place between one foreign country and another, rather than between the United States and a foreign country. *United States* v. *Minnesota Mining & Mfg Co.,* 92 F. Supp. 947, 961, 963 (D. Mass.).[12]

The "whole mass of potential conflicts" with foreign governments that alarm petitioners (Pet. 10) are

[12] Petitioners' quotation from this case (Pet. 10) is out of context.

simply non-existent. The court below correctly answered that "all parties must be Americans to participate in serving this [AID] market for American-flag shipping. Consequently there are few possible international complications to justify an interpretation that deliberately cuts back on the scope of the antitrust laws as applied to commerce which greatly concerns the United States. It is plain that where American foreign commerce is affected foreigners may be held under our antitrust laws for restraints thereon. It is also significant, for the purpose of determining whether what is involved constitutes activities affecting American foreign commerce within the scope of the antitrust laws that the trade not only has significant contacts and nexus with the United States but also is the province of American concerns." App. 20a-21a.

Petitioners' argument that Sherman Act jurisdiction will undercut the regulation of American carriers under section 15 of the Shipping Act is answered by *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, which held (1) that it had long been recognized that the antitrust laws represent a fundamental national economic policy from which no industry is exempted absent specific congressional requirements to that effect, (2) that the Shipping Act did not repeal all antitrust regulation of the industry but gave it only limited exemption from the antitrust laws, and (3) that agreements among shipping lines that had *not* been subjected to examination by, and had *not* received the approval of, the Maritime Commission were subject to the antitrust laws. As the agreements in *Carnation,* just as the AFBO agreement in this case (JA 12), had *not* been approved by the Maritime Commission, they were held violative of the Sherman Act.

4. The decision below was correct in rejecting petitioners' arguments based upon asserted applicability of the doctrines of primary jurisdiction and collateral estoppel.

Petitioners argue that "Primary jurisdiction requires that antitrust actions in regulated industries be stayed pending the type of administrative proceeding *which has already occurred in this case*" and that "it is of critical importance that agency fact findings on contested, relevant issues *in areas of agency expertise* be given the fullest respect in subsequent judicial proceedings between the same parties." Pet. 16-17. The emphasis in the preceding quotations from the petition is ours, and the emphasized portions would seem to us to be the complete answer to petitioners' argument. Respondents have here done all that the primary jurisdiction rule requires, i.e., they sought relief from the Maritime Commission before going to court. The Commission, whose area of expertise is defined and confined by the Shipping Act, found "that the reach of the [Shipping] Act and, consequently our jurisdiction, does not extend to the matters complained of" (JA 115) for "the simple reason that the trade does not involve as one terminus any port in * * * the United States." JA 117. The Commission having exercised its expertise to determine that the relief sought was not subject to its jurisdiction, jurisdiction remained in the courts to grant appropriate relief—specifically, relief under the antitrust laws. *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439; *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 224.

Petitioners incorrectly asserted (Pet. 18) that "the Commission *found as a fact* * * * that even under Sherman Act principles the allegedly unlawful activities

'neither directly nor materially affected our foreign commerce.' (p. 9c (*sic*) *infra*)." The portion of the Commission's decision thus quoted by petitioners (App. 8c) can mean no more than that petitioners' unlawful activities "neither directly nor materially affected our foreign commerce" *within the meaning of the Shipping Act.* This is clear not only from the Commission's decision as a whole, which is concerned in its entirety with "the reach of the [Shipping] Act and, consequently our jurisdiction" (App. 3c), but also from the context of the very note from which petitioners quote, which is concerned with *United States* v. *Anchor Line, Ltd.,* 232 F. Supp. 379 (S.D.N.Y.), a Shipping Act case.

Moreover, contrary to their emphatic assertion, petitioners' quotation is not of a finding of fact at all, but a conclusion of law—at best, from petitioners' standpoint, a mixed determination of law and fact. And the doctrine of collateral estoppel "makes conclusive in subsequent proceedings *only determinations* of fact, and mixed fact and law, *that were essential to the decision.*" *Yates* v. *United States,* 354 U.S. 298, 336 (emphasis supplied; partially quoted out of context by petitioners, Pet. 18-19); *Irving Nat. Bank* v. *Law,* 10 F. 2d 721, 724 (C.A. 2). "All this," as Judge Learned Hand said in the *Irving Bank* case, "is very old law." The complaint filed with the Maritime Commission charged Shipping Act violations (JA 45-49) and sought Shipping Act relief. JA 49-50. The Commission determined it lacked Shipping Act jurisdiction. JA 115-20. No legal/factual determinations under the Sherman Act were essential to that decision. As stated by the court below (App. 8a), "The Commission did not rule that there was no 'foreign commerce'

as that term is used in the Sherman Act, nor did it rule that the standards under the two acts were the same." This was entirely outside the scope of its inquiry. Thus there is no more collateral estoppel here than there was in *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451 (attack on machinery leases made in prior litigation brought under the Sherman Act held no estoppel of litigation under Clayton Act involving same leases—"The Sherman Act and the Clayton Act provide different tests of liability." 258 U.S. at 459) or in *Federal Trade Com.* v. *Cement Institute*, 333 U.S. 683 (*Old Cement* litigation brought under the Sherman Act held no estoppel of litigation under the Federal Trade Commission Act—"conduct * * * which falls short of being a Sherman Act violation may as a matter of law constitute an 'unfair method of competition' prohibited by the Trade Commission Act." 333 U.S. at 708).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Article I, Section 8, Clause 3 of the Constitution of the United States:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Act of July 2, 1890, c. 647, § 1, 26 Stat. 209, 15 USC § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Act of July 2, 1890, c. 647, § 2, 26 Stat. 209, 15 USC § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Act of July 2, 1890, c. 647, § 3, 26 Stat. 209, 15 USC § 3:

> Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal.

Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, 15 USC § 15:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Act of Aug. 26, 1954, c. 936, 68 Stat. 832, as amended, 46 USC § 1241(b):

(b) Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas: Provided, That

the provisions of this subsection may be waived whenever the Congress by concurrent resolution or otherwise, or the President of the United States or the Secretary of Defense declares that an emergency exists justifying a temporary waiver of the provisions of this subsection and so notifies the appropriate agency or agencies: And provided further, That the provisions of this subsection shall not apply to cargoes carried in the vessels of the Panama Canal Company. Nothing in this subsection shall repeal or otherwise modify the provisions of section 616a of Title 15. * * *.

AID Regulation 1, Section 201.6(N), 22 C.F.R. § 201.6(N):

(N) U.S. flag vessel shipping requirement—

(1) Scope of cooperating country responsibility. The cooperating country will ensure that at least 50 percent of the gross tonnage of all ICA-financed commodities transported to it on ocean vessels during each U. S. fiscal year as well as each quarterly period thereof is transported on privately-owned U. S. flag commercial vessels. The foregoing requirement applies separately for dry bulk carrier shipments, dry cargo liner shipments (i) from the U.S.; (ii) from Europe and Africa; (iii) from the area of the Near East and South Asia; (iv) from Latin America and Canada; and (v) from the area of the Far East. If the foregoing requirement is not met with respect to shipments made during any fiscal year or quarter thereof, the cooperating country will pay promptly to the Director upon demand whatever amount, reimbursed by ICA for commodities, marine insurance, and transportation in shipments directed to the cooperating country during that period of time, as the Director in his discretion shall consider necessary to effect a compliance by the cooperating country with the foregoing requirement for that period of time.

(2) Non-availability of U. S. flag vessels. Any cooperating country may at any time apply to the Office of Transportation, ICA, Washington, D. C., for an administrative determination with respect to any proposed shipment that no privately-owned U. S. flag commercial vessel is available for such shipment at

fair and reasonable rates for such a vessel. In the event that the Office of Transportation shall make such a determination of non-availability, it will advise the cooperating country thereof. Tonnage involved in any or all shipments included in the determination of non-availability of U. S. flag vessels may or may not be excluded from the total tonnage of the fiscal year and the relevant quarter thereof for at least 50 percent of which the cooperating country must ensure transportation on U. S. flag vessels. The determination concerning such exclusion shall be made by the Office of Transportation after a review of all pertinent factors relating to all ICA-financed shipments to the cooperating country during the relevant fiscal year and quarterly period, and the cooperating country shall be advised thereof by the Office of Transportation.

Pub. Law 87-195, Pt. I, § 102, Sept. 4, 1961, 75 Stat. 424, 22 USC § 2151:

It is the sense of the Congress that peace depends on wider recognition of the dignity and interdependence of men, and survival of free institutions in the United States can best be asserted in a world-wide atmosphere of freedom.

To this end, the United States has in the past provided assistance to help strengthen the forces of freedom by aiding peoples of less developed friendly countries of the world to develop their resources and improve their living standards, to realize their aspirations for justice, education, dignity, and respect as individual human beings, and to establish responsible governments.

The Congress declares it to be a primary necessity, opportunity, and responsibility of the United States, and consistent with its traditions and ideals, to renew the spirit which lay behind these past efforts, and to help make a historic demonstration that economic growth and political democracy can go hand in hand to the end that an enlarged community of free, stable, and self-reliant countries can reduce world tensions and insecurity.

It is the policy of the United States to strengthen friendly foreign countries by encouraging the development of their free economic institutions and productive capabilities, and by minimizing or eliminating barriers to the flow of private investment capital.

* * * * *

Also, the Congress reaffirms its conviction that the peace of the world and the security of the United States are endangered so long as international communism continues to attempt to bring under Communist domination peoples now free and independent and to keep under domination peoples once free but now subject to such domination. It is, therefore, the policy of the United States to continue to make available to other free countries and peoples, upon request, assistance of such nature and in such amounts as the United States deems advisable and as may be effectively used by free countries and peoples to help them maintain their freedom. Assistance shall be based upon sound plans and programs; be directed toward the social as well as economic aspects of economic development; be responsive to the efforts of the recipient countries to mobilize their own resources and help themselves; be cognizant of the external and internal pressures which hamper their growth; and shall emphasize long-range development assistance as the primary instrument of such growth.

* * * * *

It is the sense of the Congress that assistance authorized by this chapter should be extended to or withheld from the government of South Vietnam, in the discretion of the President, to further the objectives of victory in the war against communism and the return to their homeland of Americans involved in that struggle.